A

Ga Yee Furniture Sdn Bhd & Ors v Dato' Khor Wooi Chen

B

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO P-02(IM)(NCC)-1099–06 OF 2017
UMI KALTHUM, ABDUL RAHMAN SEBLI AND ZALEHA YUSOF JJCA
1 SEPTEMBER 2020

C

Companies and Corporations — Winding up — Liquidator — Application to appoint interim liquidator under s 476 of the Companies Act 2016 and/or under r 35(1) of the Companies (Winding-Up) Rules 1972 or under the inherent jurisdiction of court — High Court allowed application — Whether there was compelling evidence of dissipation of assets, misfeasance and/or misappropriation of funds from the company by shareholder — Companies Act 2016 s 476 — Companies (Winding-Up) Rules 1972 r 35(1)

D

The respondent was the minority shareholder of the first appellant ('the company') whilst the second and third appellants were the majority shareholders of the company. Vide encl 4, the respondent had filed an application to appoint an interim liquidator for the company pursuant to s 476 of the Companies Act 2016 ('the Act') and/or under r 35(1) of the Companies (Winding-Up) Rules 1972 or under the inherent jurisdiction of the court. The High Court had allowed encl 4, hence the present appeal. The respondent submitted that the learned High Court judge made the correct decision in allowing encl 4 as there was compelling evidence of dissipation of assets, misfeasance and/or misappropriation of funds from the company by the second appellant in that: (a) the second appellant had been making monthly payment of RM30,000 to himself without sanction from the shareholders at the annual general meeting; (b) the second appellant had misappropriated the proceeds from the sale of scrap items belonging to the company by channelling the amount into his personal bank account; and (c) the second appellant approved payments to his own personal lawyers using company funds.

E

F

G

H

Held, dismissing the appeal with costs to the respondent:

(1) It was undisputed that there was no sanction by the shareholders or members' resolution to approve the monthly 'Directors' Fees'. To date, no shareholders meeting had been called and monies continue to be taken out of the company to pay the second appellant. As for the sale of the scrap items, the second appellant did not deny giving instruction for all the proceeds of the said sale to be channelled and paid into his personal account. The second appellant's action was in clear breach of s 132(1) of the Companies Act 1965 which provided that a director shall at all times

I

act honestly and use reasonable diligence in the discharge of the duties of his office. In totality, there was an elaborate web of deceit by the second appellant to deceive the company and its members for his own personal use (see paras 10, 14–15 & 17–18).

(2) The court's attention was also drawn to the fact that previously two signatures were required to sign the bank accounts and cheques and the respondent was one of the signatories. However, this check and balance mechanism was removed as soon as the second and third appellants joined the company. Presently, the second appellant was the sole signatory to all the company's bank accounts. He therefore had full access to the assets of the company without any form of control (see para 21).

(3) The learned judge was therefore right to rule that in the circumstances, the appointment of an interim liquidator was necessary to preserve and to protect the assets of the company from further dissipation pending the hearing of the winding up petition (see para 22).

[Bahasa Malaysia summary

Responden adalah pemegang saham minoriti perayu pertama ('syarikat') sementara perayu kedua dan ketiga adalah pemegang saham majoriti syarikat tersebut. Melalui lampiran 4, responden telah mengemukakan permohonan untuk melantik pelikuidasi sementara untuk syarikat menurut s 476 Akta Syarikat 2016 ('Akta') dan/atau di bawah k 35(1) Kaedah-Kaedah (Penggulungan) Syarikat 1972 atau di bawah bidang kuasa mahkamah yang wujud. Mahkamah Tinggi telah membenarkan lampiran 4, oleh itu rayuan semasa. Responden berhujah bahawa hakim Mahkamah Tinggi yang bijaksana membuat keputusan yang tepat dalam membenarkan lampiran 4 kerana terdapat bukti yang kukuh mengenai pelupusan aset, misfeasans dan/atau penyalahgunaan dana syarikat oleh perayu kedua iaitu: (a) perayu kedua telah membuat pembayaran bulanan sebanyak RM30,000 kepada dirinya sendiri tanpa kebenaran daripada pemegang saham pada mesyuarat agung tahunan; (b) perayu kedua telah menyalahgunakan hasil penjualan barang-barang sekerap milik syarikat dengan menyalurkan jumlah tersebut ke dalam akaun bank peribadinya; dan (c) perayu kedua meluluskan pembayaran kepada peguam peribadinya sendiri menggunakan dana syarikat.

Diputuskan, menolak rayuan dengan kos diberikan kepada responden:

(1) Tidak dapat dipertikaikan bahawa tidak ada kebenaran diberikan oleh pemegang saham atau resolusi anggota untuk menyetujui 'Yuran Pengarah' bulanan. Sehingga kini, tidak ada mesyuarat pemegang saham yang dipanggil dan wang terus dikeluarkan dari syarikat untuk membayar perayu kedua. Bagi penjualan barang-barang sekerap tersebut, perayu kedua tidak menafikan bahawa dia telah memberi arahan agar semua hasil penjualan tersebut disalurkan dan dibayar ke dalam akaun

peribadinya. Tindakan perayu kedua adalah jelas melanggar s 132(1) Akta Syarikat 1965 yang memperuntukkan bahawa seorang pengarah harus pada setiap masa bertindak jujur dan menggunakan usaha yang munasabah dalam melaksanakan tugas-tugas jawatannya. Secara keseluruhannya, terdapat jaringan tipu daya yang terperinci oleh perayu kedua untuk menipu syarikat dan anggotanya untuk kegunaan peribadinya sendiri (lihat perenggan 10, 14–15 & 17–18).

(2) Perhatian mahkamah juga terarah kepada fakta bahawa sebelum ini dua tandatangan diperlukan untuk menandatangani akaun bank dan cek dan responden adalah salah satu penandatangan. Walaubagaimanapun, mekanisma semak dan imbang ini dikeluarkan sebaik sahaja perayu kedua dan ketiga menyertai syarikat tersebut. Ketika ini, perayu kedua adalah satu-satunya penandatangan untuk semua akaun bank syarikat. Oleh itu, dia mempunyai akses penuh ke atas aset syarikat tanpa apa-apa bentuk kawalan (lihat perenggan 21).

(3) Oleh itu, hakim yang bijaksana telah membuat keputusan yang tepat apabila memutuskan bahawa dalam keadaan kes ini, pelantikan pelikuidasi sementara diperlukan untuk memelihara dan melindungi aset syarikat dari terus dilupuskan sementara menunggu pendengaran petisyen penggulungan (lihat perenggan 22).]

Cases referred to

Avel Consultants Sdn Bhd & Anor v Mohamed Zain Yusof & Ors [1985] 2 MLJ 209; [1985] CLJ Rep 37; [1985] 2 CLJ 11, SC (refd)

George Newman & Co, In re [1895] 1 Ch 674, CA (refd)

Shanmugam Paramsothy v Thiagarajah Pooinpatarsan & Ors [2004] 5 MLJ 31; [2001] 8 CLJ 683, HC (refd)

Tengku Dato Ibrahim Petra bin Tengku Indra Petra & Ors v Perdana Petroleum Bhd (formerly known as Petra Perdana Bhd) [2013] 8 MLJ 280; [2013] 4 CLJ 600, HC (refd)

Wong See Yaw v Bright Packaging Industry Bhd [2016] 6 CLJ 465, HC (refd)

Legislation referred to

Companies (Winding-Up) Rules 1972 r 35(1)
Companies Act 1965 (repealed by the Companies Act 2016) s 231
Companies Act 2016 ss 132(1), 476

Appeal from: Companies (Winding-Up) Petition No PA-28NCC-20 of 2017 (High Court, Pulau Pinang)

Ranjit Singh (Karin Lim and P Suppiah with him) (Presgrave & Mathwes) for the appellants.

Wong Rhen Yen (Goik Kenwayne with him) (Dennis Nik & Wong) for the respondent.

Abdul Rahman Sebli JCA (delivering judgment of the court):

[1] We dismissed the appeal by a unanimous decision after hearing arguments by the parties and these are our grounds. In the High Court, the respondent applied vide encl 4 to appoint an interim liquidator for the first appellant, Ga Yee Furniture Sdn Bhd, pursuant to s 476 of the Companies Act 2016 ('the Act') and/or under r 35(1) of the Companies (Winding-Up) Rules 1972 or under the inherent jurisdiction of the court.

[2] The facts are these. The respondent, Dato' Khor Wooi Chen, is a minority shareholder of the first appellant with a 30% shareholding. The second and third appellants are the new shareholders who took over control of the first appellant from its previous majority shareholder sometime in May 2016.

[3] The respondent's application in the High Court was premised on the following grounds:

(a) there was a good prima facie case to support the application;

(b) there was compelling evidence showing misappropriation and/or mismanagement of company funds;

(c) the assets of the company were in jeopardy;

(d) the second appellant was the sole signatory to all of the company's bank accounts;

(e) the second and third appellants had full and absolute control over the management and the company's board of directors;

(f) the appointment of an interim liquidator was necessary to preserve and protect the assets of the company from further being dissipated pending the hearing and disposal of the winding up proceedings;

(g) it was also necessary in order for the interim liquidator to take possession and to preserve whatever documentary evidence of mismanagement and/or misappropriation of funds that may still be available in the company's records and to carry out investigation into the affairs of the company; and

(h) there was no prejudice to the application because the interim liquidator or a liquidator is an officer of the court and is under the supervision of the court.

[4] Section 476 of the Act provides as follows:

A

(1) The Court may appoint the Official Receiver or an approved liquidator as an interim liquidator at any time after the presentation of a winding up petition and before the making of a winding up order.

(2) The interim liquidator shall have and may exercise all the functions and powers of a liquidator subject to such limitations and restrictions as may be prescribed by the rules or as the Court may specify in the order appointing him.

B

[5] Rule 35(1) of the Companies (Winding-Up) Rules 1972 on the other hand provides:

C

(1) At any time after the presentation of a petition, the Court may, upon the application of any creditor or contributory of the company and upon proof by affidavit of sufficient ground for the appointment of a provisional liquidator make the appointment upon such terms as the Court shall think just or necessary.

D

[6] Section 476 of the Act is identical with the former s 231 of the Companies Act 1965 save for the word 'interim', which is as follows:

E

The Court may appoint the Official Receiver or an approved liquidator provisionally at any time after the presentation of a winding up petition and before the making of a winding up order and the provisional liquidator shall have and may exercise all the functions and powers of a liquidator subject to such limitations and restrictions as may be prescribed by the rules or as the Court may specify in the order appointing him.

F

[7] The court will appoint an interim liquidator upon presentation of a winding up petition if there is good prima facie evidence that:

G

(a) the company will be wound up because the company is obviously insolvent; or

(b) the company's assets are in jeopardy; or

(c) there are other circumstances which makes it imperative for the court to intervene.

H

[8] It was the respondent's contention that the learned High Court judge made the correct decision in allowing encl 4 as there was compelling evidence of dissipation of assets, misfeasance and/or misappropriation of funds from the first appellant by the second appellant in that:

I

(a) the second appellant had been making monthly payment of RM30,000 to himself since joining the company in May 2016 without any approval or sanction from the shareholders at the annual general meeting contrary to article 75 of the memorandum and articles of association;

(b) the second appellant had misappropriated proceeds from the sale of scrap items belonging to the company and channeling into his personal bank account with Alliance Bank. Previously, all proceeds from the sale of the scrap items were paid into the company's bank accounts;

(c) the second appellant approved payments to his own personal lawyers using company funds. It is not disputed that the first appellant never retained or appointed the law firm of 'Norliza & Associates' or En Abd Fareed bin Abd Gafoo ('Fareed'). They were in fact the second appellant's personal lawyers; and

(d) the second appellant misappropriated company funds by issuing cheques for the amount of RM40,000 in the name of Richmond Leow Heng Thian, who was at the material time the CEO of the company. Richmond was then instructed by the second appellant to cash the cheque and to deliver the cash to Fareed. This is notwithstanding the fact that the payment voucher was made in the name of 'Norliza & Associates' and not Fareed.

[9] The above transactions were not denied by the second appellant but justified the dissipation and/or misappropriation, which the respondent submitted was illogical and without basis, for the reason that the remuneration of the directors shall from time to time be determined by the company at the general meeting. This is stipulated by article 75 of the memorandum and articles of association, which provides:

> 75. The remuneration of the Directors shall from time to time be determine by the Company in General Meeting. The Directors shall also be paid such travelling, hotel and other expenses as may reasonably be incurred by them in the execution of their duties, including any such expenses incurred in connection with their attendance at the meetings of Directors. If by arrangement with the other Directors any Director shall perform or render any special duties or services outside his ordinary duties as a Director, the Directors may pay him special remuneration, in addition to his ordinary remuneration, and such special remuneration may be by way of salary, commission, participation in profits otherwise or as may be arranged.

[10] It was undisputed that there was no sanction by the shareholders or members' resolution to approve the monthly 'Directors' Fees' which the second appellant paid himself. Despite the challenge mounted on the said unlawful payments, the second appellant continued to pay himself the sum of RM30,000 notwithstanding the prima facie finding of 'Dissipation/Misappropriation' by the learned High Court judge. We reproduce below the relevant part of the High Court's judgment:

> Tidak ada resolusi syarikat dikemukakan untuk membuktikan bahawa bayaran tersebut adalah dibuat secara sah untuk pembayaran responden kedua.
>
> Dengan keadaan itu, adalah tidak wajar bahawa asset-aset syarikat responden

pertama telah dikeluar dan dilepaskan oleh responden kedua tanpa persetujuan atau sanksi dari pemegang-pemegang saham dan ianya bercanggah dengan article 75, MMA, kerana responden kedua bertindak untuk kepentingannya sendiri.

Selanjutnya, pihak responden kedua juga menyatakan yang beliau telah menghentikan pembayaran RM30,000 ini kepada beliau. Walau bagaimanapun, saya dapati tidak terdapat bukti-bukti yang dikemukakan bagi membuktikan yang bayaran kepada responden kedua telah dihentikan.

Tanpa adanya sebarang pembuktian daripada pihak responden kedua, saya dapati pengataan responden kedua yang bayaran RM30,000 kepada beliau telah diberhentikan adalah tidak berasas.

[11] We were referred by learned counsel for the respondent to the case of *In re George Newman & Co* [1895] 1 Ch 674 where the liquidator of the plaintiff's company commenced an action against its former director to recover monies which were purportedly paid as director's remuneration without the shareholders' approval. It was held by Lindley J as follows:

Directors have no right to be paid for their services, and cannot pay themselves or each other, or make presents to themselves out of the company's assets unless authorised so to do by the instrument which regulates the company or by the shareholders at a properly convened meeting.

[12] The principle has been adopted by our courts: see *Tengku Dato Ibrahim Petra bin Tengku Indra Petra & Ors v Perdana Petroleum Bhd (formerly known as Petra Perdana Bhd)* [2013] 8 MLJ 280; [2013] 4 CLJ 600; *Shanmugam Paramsothy v Thiagarajah Pooinpatarsan & Ors* [2004] 5 MLJ 31; [2001] 8 CLJ 683.

[13] We were also referred to *Wong See Yaw v Bright Packaging Industry Bhd* [2016] 6 CLJ 465 where it was held:

It was the first appellant himself who signed and approved the relevant payment vouchers as director's fees. The first appellant's act of getting his own signature and approval for payments intended to be made for his own direct benefit did not reflect a good sound control and governance system is place at the institution of the respondent. Surely an exception can be made where, for the first appellant, the signature could instead be arranged to be given by the Chairman, subject to confirmation that the papers were in order. As such, the contention that the payments of RM108,000 and RM9,000 to the first and second appellants, respectively, was for travelling allowances and not for director's fees, despite the description on the vouchers, was therefore untenable and could not be accepted. Being director's fees, the sums should have been tabled to the shareholders at a general meeting for approval.

[14] To date, no shareholders meeting has been called and monies continue to be taken out of the first appellant to pay the second appellant.

[15] As for the sale of the scrap items, the second appellant did not deny giving instruction for all the proceeds from the sale of scrap items belonging to the first appellant to be channeled and paid into his personal account in Alliance Bank. He however claimed that the proceeds were paid into his personal account because of the fear of burglary and that the monies were actually held on trust by him for the first appellant.

[16] The learned High Court judge dealt with the issue in the following manner:

> Daripada keterangan-keterangan affidavit yang difailkan dan hujah-hujah dari kedua-dua pihak, saya dapati responden kedua telah melakukan penyalahgunaan hasil jualan dari barang-barang skrap syarikat. Ini adalah kerana tidak ada sebab yang wajar untuk reponden kedua bertindak demikian kerana hasil jualan adalah dari barang-barang kepunyaan syarikat dan responden pertama sendiri mempunyai empat akaun (lihat ms 144–147, petisyen) untuk dimasukkan hasil-hasil jualan tersebut.
>
> Kenapa perlu hasil-hasil ini dimasukkan ke dalam akaun peribadi responden kedua, melainkan ianya telah disalahgunakan oleh responden kedua dengan memasukkan ke akaun peribadi beliau.

[17] What the second appellant had done was in clear breach of s 132(1) of the Act which provides that a director shall at all times act honestly and use reasonable diligence in the discharge of the duties of his office. He was treating the company funds as if, in counsel for the respondent's words 'it is his own ATM machine'. He even had the audacity to say that he is entitled to use the company funds as he sees fit simply because the company owes him money. The Supreme Court in *Avel Consultants Sdn Bhd & Anor v Mohamed Zain Yusof & Ors* [1985] 2 MLJ 209; [1985] CLJ Rep 37; [1985] 2 CLJ 11 held as follows:

> The law is clear that a director of a company is in a fiduciary relationship with his company and as such he is precluded from acting in a manner which will bring his personal interest into conflict with that of his company.

[18] On the evidence and having regard to the findings of the High Court, we agree that there was an elaborate web of deceit by the second appellant to deceive the company and its members for his own personal use. We were referred to p 171 of the appeal record which shows that the appellants themselves did not even know how to explain themselves when caught red handed with the misappropriation of the company funds.

[19] This is what the learned High Court judge said in relation to issuance of the payment voucher to the legal firm of 'Norliza & Associates' by the second appellant:

A Saya dapati daripada keterangan yang dikemukakan, responden kedua tidak menafikan bahawa beliau telah luluskan baucer bayaran firma kepada firma Norliza untuk perkara peribadi beliau.

Mahkamah dapati tidak terdapat resolusi dari lembaga pengarah atau resolusi daripada pemegang-pemegang saham yang membenarkan 'arrangement' di antara
B responden kedua dan responden pertama. Juga hutang yang dikatakan itu tidak terdapat di dalam akaun-akaun kewangan responden pertama.

...

Responden kedua juga akui bahawa wang berjumlah RM40,000 tidak dibayar
C kepada firma Norliza walaupun diserahkan dalam bentuk baucer bayaran. Sebaliknya responden kedua akui wang-wang tersebut dikemukakan secara tunai di bawah nama 'Richmond' atas arahan responden kedua dan kemudiannya terus diberikan kepada Fareed.

Ini jelas menunjukkan penyalahgunaan dana responden pertama sedang dilakukan
D oleh responden kedua.

[20] Police reports had also been lodged against the second appellant for the dissipation of the assets, misappropriation, embezzlement and/or criminal breach of trust.

E

[21] Our attention was also drawn to the fact that previously two signatures were required to sign the bank accounts and cheques and the respondent was one of the signatories. However, this check and balance mechanism was removed as soon as the second and third appellants joined the company.
F Presently, the second appellant is the sole signatory to all the company's bank accounts. He therefore had full access to the assets of the company without any form of control.

G **[22]** The learned judge was therefore right to rule that in the circumstances, the appointment of an interim liquidator is necessary to preserve and to protect the assets of the company from further dissipation pending the hearing of the winding up petition.

H **[23]** It was for the reasons aforesaid that we dismissed the appeal with costs to the respondent.

Appeal dismissed with costs to respondent.

I Reported by Dzulqarnain bin Ab Fatar